INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statement	2
Argument	5
Conclusion	10

CITATIONS

Cases:

Bates v. *Preble*, 151 U.S. 149	6
Blumenthal v. *United States*, 332 U.S. 539	8
Dennis v. *United States*, 384 U.S. 855	7
Irvin v. *Dowd*, 366 U.S. 717	6
James v. *United States*, 416 F. 2d 467, certiorari denied, 397 U.S. 907	7
Marshall v. *United States*, 360 U.S. 310	6
Posey v. *United States*, 416 F. 2d 545, certiorari denied, 397 U.S. 946	7
Rideau v. *Louisiana*, 373 U.S. 723	6
Sheppard v. *Maxwell*, 384 U.S. 333	6
United States v. *Milanovich*, 303 F. 2d 626	6
United States v. *Staples*, 445 F. 2d 863, certiorari denied, 404 U.S. 1048	6

Statutes:

18 U.S.C. 3500(b), as amended 84 Stat. 926	7
21 U.S.C. (1964 ed.) 173	2
21 U.S.C. (1964 ed.) 174	2

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1432

FERNANDO ACOSTA, PETITIONER

v.

UNITED STATES OF AMERICA

No. 72-1455

RAUL FERNANDEZ, LUCRECIA LUM, AND ANNA ECHAVARRY, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 72-1600

CLARENCE JACKSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The first opinion of the court of appeals (Pets. App. A) is reported at 462 F. 2d 740. The second opinion of the court of appeals (Pets. App. B) is not yet reported. The opinion of the district court on remand is not reported.

JURISDICTION

The judgment of the court of appeals was entered February 12, 1973. An order denying a petition for rehearing (Pets. App. C) was entered March 26, 1973. The petitions for writs of certiorari were filed on April 21, 1973 (No. 72-1432), April 26, 1973 (No. 72-1455), and May 15, 1973 (No. 72-1600). The petition in No. 72-1600 is out of time under Rule 22(2) of the Rules of this Court.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the presence in the jury room of two books relating to narcotics tainted the jury verdict.

2. Whether in the circumstances the trial court properly denied petitioner's request for grand jury minutes.

3. Whether petitioners were properly found to be participants in a single conspiracy and whether the introduction of narcotics into evidence was prejudicial error.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioners were convicted of conspiracy unlawfully to import and transport narcotic drugs, in violation of 21 U.S.C. (1964 ed.) 173, 174.[2]

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[1] Mr. Justice Powell granted petitioners in No. 72-1455 an extension of time until April 26, 1973, within which to file a petition for certiorari.

[2] Three additional defendants were indicted and convicted but have not petitioned. Petitioners Acosta, Fernandez and Echavarry were also indicted (along with two others) and convicted on a substantive count of unlawfully importing six pounds, ten ounces of cocaine but all convictions on this count were reversed on appeal (Pets. App. 2).

1. Evidence introduced at trial indicates that petitioners Fernandez and Acosta first associated with defendant Paz in New York City for purposes of drug dealing (Tr. 424-474) and engaged in drug sales as early as 1965 (Tr. 276-283). Paz and his wife thereafter fled to Managua, Nicaragua, and an international organization developed, with operatives in Managua, Nicaragua; Guayaquil, Ecuador; Lima, Peru; and Miami, New York and Detroit. The organization imported cocaine and some heroin obtained by Fernandez through his "French Connection" (Tr. 2046, 2047, 2281-2281). Couriers, all young American girls, travelled either to Managua (Tr. 1122, 1276, 1419, 1481, 1621), Lima (Tr. 652-653, 663, 1716), or Guayaquil (Tr. 1427, 1726) and returned with bags of cocaine strapped to their bodies (Tr. 1154, 1279-1281, 1500-1501, 1624).[3] The cocaine was delivered to petitioners Fernandez and Acosta in Miami (Tr. 3792) for resale. A New York ring which included petitioner Lum (Tr. 2032, 2033), and in turn supplied a Detroit ring, in which petitioner Jackson participated (Tr. 1957, 2286, 2287, 2312). The Detroit operation also assisted in transportation of the drugs (Tr. 1962, 1988, 1955).

During trial, the government introduced, as evidence in support of the substantive count, six pounds of cocaine seized from a courier by customs agents at Miami International Airport (Tr. 2536), as well as two exhibits of heroin (Tr. 436-461) which a government

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[3] The girls also transported letters, funds, lactose (for cutting drugs) and gifts to Nicaraguan officials (Tr. 651, 674, 688, 691, 1695). Many such couriers were identified as co-conspirators but not codefendants, and testified at trial. Petitioner Echavarry supervised many courier operations (Tr. 1717, 1721, 1727, 1735); on one trip drugs worth $1,500,000 were imported (Tr. 1625).

agent had purchased from a defendant. Objections to both exhibits were overruled by the trial court.

On the seventeenth day of trial, the court and counsel discovered two books in the jury room, both relating generally to the social problems of narcotics use and traffic, but not related particularly to this case or to the defendants on trial. Petitioners' motion for a mistrial was denied (Tr. 3731-3733). The court instructed the alternate juror, who had brought them that day, to take them home and instructed the jury as follows:

> Let me say one other thing. I hate to restrict you on your reading. However, until after this case is over, don't read anything, unless you get a letter from someone in your family. If you have to read any books or anything that might give you new and independent ideas about any of this matter, don't discuss it with each other. [Tr. 3804.]

A motion that the books be obtained and their prefaces read into the record was denied, and no specific references to the books were made to the jury.

Upon conclusion of the direct testimony of the government witnesses, defendants moved for production of the the minutes of the witnesses' grand jury for impeachment purposes. The court examined a substantial portion of the testimony *in camera* and determined that disclosure was not appropriate, especially in view of the Jencks Act material which had been made available (Pets. App. 13).

2. On appeal, the convictions on the substantive charges were reversed for lack of evidence sufficient to convict, and the case was remanded for an evidentiary hearing to determine whether the verdict on the conspiracy count had been tainted by the presence of the two books in the jury room.

At the remand hearing, all jurors were examined by the court, separately and under oath. Testimony indicated that the books had been brought to the jury room by the second alternate juror, Dr. Johnston (Tr. 68), and placed on the table. One juror, Mrs. Rogers, skimmed "a few paragraphs off a couple of pages" concerning "different drugs and the effect it [sic] has on people, and it is really common knowledge" (Tr. 89). Although Dr. Johnston thought several jurors glanced at the books, without studying them (Tr. 69, 76), only two other jurors even tentatively recalled that either book had been present (Tr. 49, 84).[4] Evidently Mrs. Rogers was the only one who read any part of them, and the books were not discussed.[5]

Dr. Johnston did not participate in any jury deliberations or the final verdict (Tr. 71). The district court then found that no reasonable possibility existed that the verdict on the conspiracy count could have been affected by this material. The court of appeals affirmed.

ARGUMENT

1. Petitioners contend that the presence of two books concerning narcotics in the jury room required that the verdict be overturned. However, the determination of when extrinsic information has prejudiced a jury's verdict is largely within the trial court's province, since

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[4] Another juror remembered another pamphlet listing various drugs, but did not read it or discuss it with anyone (Tr. 60).

[5] Dr. Johnston stated that he may have discussed "the definition of certain drugs, cocaine or something like that" in the presence of other jurors (Tr. 69-70). He also stated "I may have showed them [anybody on this panel] where it [the book] was or what it was about, what the drugs were" (Tr. 70-71). No juror remembered discussing drugs with Dr. Johnston.

each case must turn on its own special facts. *Marshall* v. *United States,* 360 U.S. 310, 312. Here, the extrinsic matter did not relate to the guilt or innocence of these petitioners and the trial court determined that there was no reasonable possibility that the verdict of any juror was affected. Neither any decision of this Court, nor that of any court of appeals, requires automatic reversal in such a case. The government is at least entitled to show the absence of actual prejudice. *E.g., United States* v. *Staples,* 445 F. 2d 863 (C.A. 5), certiorari denied, 404 U.S. 1048; *United States* v. *Milanovich,* 303 F. 2d 626, 629 (C.A. 4).

The principal cases relied upon by petitioners involved pretrial publicity, or other information specifically suggesting the accused's guilt. See *Sheppard* v. *Maxwell,* 384 U.S. 333; *Rideau* v. *Louisiana,* 373 U.S. 723; *Irvin* v. *Dowd,* 366 U.S. 717.

Petitioners Acosta and Jackson note that in *Bates* v. *Preble,* 151 U.S. 149, this Court found reversible error in the failure to seal off pages of a book given to the jury (Pets. Nos. 72-1432 and 72-1600, p. 15). The "book" there involved was plaintiff's account book, consisting of entries in her handwriting showing securities she owned. The pages not sealed contained "matter, which, though bearing upon the issue, was wholly inadmissible as testimony," *id.* at 158. In the present case, by contrast, the trial court found that the content of the books "was not of a prejudicial nature, since it was similar to what in recent years has become common knowledge to every person who reads a newspaper, magazine, or listens to radio or television" (District Court opinion, p. 7). The court also noted that "[t]he evidence was so one-sided as to proof of guilt as to utterly negate any assertion by the defendants that the presence of the books had

any more than an infinitesimally small effect, if any, on the jury's verdicts" (*id.* at 10). These factual determinations were affirmed on appeal. There is no occasion for further review of these findings.

2. Petitioners also ask review of the denial of their request for disclosure of grand jury minutes.

After the conclusion of the trial in this case, the Jencks Act has been amended to require disclosure of a witness's statement before a grand jury, 18 U.S.C. 3500(b), as amended October 15, 1970, 84 Stat. 926. Therefore, the Fifth Circuit practice of requiring a showing of particularized need for such statements[6] which was followed in this case has been changed by statute.

The court below properly applied the Fifth Circuit rule then in effect, and determined that under the particular circumstances of the case, and in light of the *in camera* inspection of the grand jury testimony made by the court, and the availability of other Jencks material concerning some of the witnesses, the trial judge acted within his discretion in denying production of the testimony (Pets. App. 13-14).[7]

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[6] See, *e.g.*, *Posey* v. *United States*, 416 F. 2d 545, certiorari denied, 397 U.S. 946; *James* v. *United States*, 416 F. 2d 467, certiorari denied, 397 U.S. 907, and other cases cited in the opinion below (Pets. App. 11-12).

This practice was not inconsistent with *Dennis* v. *United States*, 384 U.S. 855, in which this Court held that a particularized need for the statements had been shown.

[7] The court below noted:

> [T]his is not a routine case. The record is replete with evidence of organized crime and of misconduct of all sorts, and of far reaching and intricate criminal organization in many countries and in several parts of the United States, and some of the defendants were at large at the time of the

3. The remaining contentions advanced are similarly without merit.

a. Petitioners Fernandez, Lum, and Echavarry contend that insufficient evidence was introduced to justify their conviction of a single conspiracy (Pet. No. 72-1455, p. 15). But the evidence clearly showed a single conspiracy and all three petitioners were linked to the common activity.[8] As this Court stated in *Blumenthal* v. *United States*, 332 U.S. 539, 557:

> Secrecy and concealment are essential features of successful conspiracy. The more completely they are achieved, the more successful the crime. Hence the law rightly gives room for allowing the conviction of those discovered upon showing sufficiently the essential nature of the plan and their connections with it, without requiring evidence of knowledge of all its details or of the participation of others * * * [citations omitted].

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trial. * * * [W]hen there is a compelling need for secrecy to protect individuals even fair play does not demand that a defendant be allowed access to the grand jury minutes for impeachment purposes. [Pets. App. 13-14.]

[8] Fernandez was mentioned as procuring heroin through his "French Connection" (Tr. 2046, 2047, 2281), and as dealing with other Miami co-conspirators at a Miami restaurant (Tr. 1931-1949) and with a New York co-conspirator at a New York motel (Tr. 2325-2331). Lum was identified with the New York group after leaving Miami where she had lived with Fernandez and his family (Tr. 2794). She was involved in a number of sales between the groups (Tr. 2019, 2020, 2045) and was employed as a guardian of drug caches (Tr. 2221, 2222). Echavarry was prominently mentioned as a member of the Nicaraguan group and her ties to the others and to the overall conspiracy are likewise established by association with the others, and trips to Lima, Guayaquil, and Miami (*e.g.*, Tr. 1734-1735).

b. All petitioners complain of the introduction into evidence of cocaine seized from a courier at the Miami airport.[9] It was introduced only in support of the substantive count which was reversed on appeal. As the court of appeals observed:

> If admission into evidence of the cocaine brought into the country by Denise Bethancourt was error, as to the conspiracy count it was harmless beyond reasonable doubt. There had been day after day of testimony by witness after witness of the details of bringing in shipments of cocaine in the same manner, and of the financing of and arrangements for the shipments, and of distribution of cocaine thus brought in. It was not reversible error for the jury to see the seized fruits of a single shipment that was not [the court of appeals concluded] sufficiently tied to the Count One [the substantive count] defendants. [Pets. App. 14.][10]

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[9] Petitioners Fernandez, Lum, and Echavarry also complain of the introduction of heroin sold to a customs agent in May 1966, which, they contend, was prior to the formation of the conspiracy (Pet. No. 72-1455, p. 11). The indictment charges that the conspiracy began "* * * on or about the summer of 1965 * * *," and lists ten overt acts allegedly transpiring prior to November 1967, which they erroneously contend marked the beginning of the conspiracy.

[10] The court below also correctly concluded on the same grounds that "if it was error to admit into evidence [the heroin]—and the question is a close one—it was not reversible" (Pets. App. 14).

CONCLUSION

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

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JUNE 1973.